

No. 17315

United States
Court of Appeals
for the Ninth Circuit

SAFEWAY STORES, INCORPORATED,
Appellant,
vs.
MARVIN FANNAN,
Appellee,
and
MARVIN FANNAN,
Appellant,
vs.
SAFEWAY STORES, INCORPORATED,
Appellee.

Transcript of Record

Appeals from the United States District Court
for the District of Oregon.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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For Appellant-Appellee Safeway Stores,
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PHILIP LEVIN,

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For Appellee-Appellant Marvin Fannan.

United States District Court
For the District of Oregon

Civil No. 60-170

MARVIN FANNAN, Misnamed in Plaintiff's Com-
plaint as MARVIN FANNON,

Plaintiff,

vs.

SAFEWAY STORES, INCORPORATED, a Cor-
poration,

Defendant.

PRETRIAL ORDER

This matter having come on regularly for pre-trial before the undersigned Judge of the above-entitled Court, plaintiff appearing by Pozzi & Wilson, his attorneys; defendant appearing by Tooze, Kerr, Tooze & Morrell, its attorneys, and this pre-trial order was made.

Admitted Facts

I.

That this action is one of a civil nature wherein the matter in controversy exceeds the sum of \$10,000 exclusive of interest and costs; that said matter in controversy is between citizens of different states, that is, between the plaintiff who at the time of the commencement of this action was and still is a resident and citizen of the State of Oregon, and the defendant, Safeway Stores, Incorporated,

which at the time of the commencement of this action was and still is a corporation organized and existing under the laws of the State of Maryland with its principal place of business in the State of California and in no other state, and which was and is a resident and citizen of the State of Maryland. That this Court has jurisdiction of this action, of the subject matter thereof, and of said parties.

II.

That during all times mentioned herein the defendant was and is duly licensed to do, and was and is doing, business in the State of Oregon and at all of said times owned and maintained a store in the City of Tillamook, State of Oregon.

III.

That plaintiff has filed timely request for trial by jury and is entitled to jury trial herein.

IV.

That on or about November 30, 1959, plaintiff was a business invitee in defendant's store in the City of Tillamook, State of Oregon, and at that time fell to the floor thereof.

Plaintiff's Contentions

Plaintiff contends and the defendant denies as follows:

I.

That on or about November 30, 1959, this plaintiff, as a business invitee at the defendant's store

in the City of Tillamook, State of Oregon, was caused to slip and fall because of a marking pencil on the floor and was caused severe injuries as hereinafter alleged.

II.

That at the time and place of the occurrence above mentioned, the defendant corporation, its officers, agents and employees, were negligent, careless and reckless in one or more of the following particulars:

1. In allowing and permitting said marking pencil to remain in the aisleway of said store.
2. In depositing the said marking pencil on said floor.

III.

That as a proximate result of said negligence of the above-named defendant, this plaintiff was caused to slip on said marking pencil and fall, causing him severe nervous shock, physical and mental pain and suffering, a tearing, twisting, and wrenching of the muscles, tendons, ligaments, bones, nerves and soft tissues of his left knee, an aggravation of a pre-existing knee condition, from all of which the plaintiff has been rendered sick, sore, nervous and distressed and has been required to undergo an operation and has sustained permanent injuries and all to his damage in the full sum of \$50,000.00.

IV.

That as a proximate result of said negligence of the above-named defendant corporation, this plaintiff has lost income and wages to date in the ap-

proximate sum of \$1500.00 and will lose further income and wages, and has incurred doctor, hospital and medical expenses to date in the approximate sum of \$646.10, and will incur further medical expenses.

V.

That at the time of the happening of said occurrence, this plaintiff was a healthy, robust, able-bodied man of the age of 28 years and capable of engaging in strenuous physical labors with a life expectancy under the standard mortality tables of 39.49 years; that plaintiff's ability to work and perform strenuous physical activities has been permanently impaired and he will continue to have pain and suffering as a proximate result of the negligence of the defendant corporation.

Defendant's Contentions

Defendant contends and the plaintiff denies that if, as plaintiff contends, the plaintiff was injured in said fall, the said fall and said injuries were proximately caused by the negligence and carelessness of the plaintiff himself in that at and immediately prior to the time of plaintiff's said fall he failed and neglected to keep a proper lookout as to the physical conditions then and there existing.

Issues

The issues in this case are raised by the contentions of the parties and the denials thereof.

Physical Exhibits

Certain physical exhibits have been identified and received as pretrial exhibits, the parties agreeing with the approval of the Court that no further identification of these exhibits is necessary. In the event that the exhibits, or any of them, should be offered as evidence at the time of trial, said exhibits are to be subject to objection only upon the grounds of relevancy, competency and materiality.

Plaintiff's Exhibits

1. X-rays of plaintiff (A to . .).
2. Deposition of Raymond Strawn.
3. Deposition of Walt Steinsiek.
4. Hospital records—St. Vincent's Hospital.
5. Hospital records—Providence Hospital.
6. Reserved.
7. Model of left leg.

Defendant's Exhibits

10. X-rays of plaintiff (A to D).
11. Pencil.
12. Deposition of plaintiff.
13. Reserved.
14. Reserved.
15. Reserved.

Expert Testimony

Each of the parties hereto reserves the right to call experts as witnesses to give opinion evidence

upon the matters upon which expert opinion can be given on the issues made by the contentions of the parties and the denials thereof.

The foregoing constitutes the pretrial order in this matter and supersedes the pleadings in this matter and shall not be amended hereafter except by the consent of the parties or to prevent manifest injustice.

Dated this 14th day of November, 1960.

/s/ WILLIAM G. EAST,
United States District Judge.

Approved as to Form:

/s/ DONALD R. WILSON,
Of Attorneys for Plaintiff.

/s/ LAMAR TOOZE,
Of Attorneys for Defendant.

Lodged November 10, 1960.

[Endorsed]: Filed November 14, 1960.

United States District Court
for the District of Oregon

Civil No. 60-170

MARVIN FANNAN, Misnamed in Plaintiff's Com-
plaint as MARVIN FANNON,

Plaintiff,

vs.

SAFEWAY STORES, INCORPORATED,

Defendant.

JUDGMENT OF DISMISSAL

This cause came on regularly for trial in the above-entitled court before the undersigned judge of said court on the 14th day of November, 1960, plaintiff appearing in person and by Donald R. Wilson, one of his attorneys, and the defendant appearing by Lamar Tooze, one of its attorneys; a jury was duly empaneled and sworn to try the cause; counsel for the respective parties made opening statements to the jury; evidence was adduced by the plaintiff and after the plaintiff had rested his case the defendant moved the court for an order directing the jury to return a verdict in favor of the defendant for the reasons and on the grounds stated in said motion; respective counsel argued said motion and the court after hearing the same, after being fully advised in the premises and treating said motion for a directed verdict as a motion for a judgment of dismissal, concluded that said motion was well taken,

Now, Therefore, it is hereby Ordered and Adjudged that said motion be and the same is hereby granted and that the above-entitled action be and the same is hereby Dismissed and that defendant have and recover of and from the plaintiff its costs and disbursements incurred herein taxed in the sum of \$169.00, without prejudice.

Dated this 14th day of November, 1960.

/s/ WILLIAM G. EAST,
United States District Judge.

[Endorsed]: Filed November 16, 1960.

[Title of District Court and Cause.]

MOTION TO AMEND JUDGMENT

Comes now the defendant and moves the Court for an order amending the judgment of dismissal made, dated and entered herein on the 14th day of November, 1960, and filed in the office of the clerk of the above-entitled Court on November 16, 1960, by deleting therefrom the words "without prejudice" at the end of the body thereof for the reasons and on the grounds that the inclusion of said words "without prejudice" is prejudicial to the defendant and is without authority in law, the judgment having been entered following the action of the Court sustaining the specific grounds of the motion of the defendant for an order directing the jury to return

a verdict in favor of the defendant made at the close of the evidence offered by the plaintiff which specific grounds showed, as a matter of law, that the evidence adduced by the plaintiff was insufficient to support a verdict in his favor.

Respectfully submitted,

/s/ LAMAR TOOZE,

Of Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Entered]: Filed November 18, 1960.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now plaintiff, by and through his attorneys, and respectfully moves the Court based upon the provisions of Rule 59 of the Federal Rules of Civil Procedure to award him a new trial of the above-entitled case upon the ground and for the reason that the Court erred in granting defendant's motion for an order of involuntary non-suit in the above-entitled case.

Respectfully submitted,

POZZI, LEVIN & WILSON,

/s/ PHILIP A. LEVIN,

Attorneys for Plaintiff.

In presenting the foregoing motion, plaintiff will rely upon the cases of *Miller v. Safeway Stores*, 69 Or. Adv. Sh. 747; *Eitel v. Times, Inc.*, 70 Or. Adv. Sh. 1129; and *Shepard v. Kienow's Food Stores*, 71 Or. Adv. Sh. 451 (Opinion on Rehearing).

/s/ PHILIP A. LEVIN,
Of Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 22, 1960.

[Title of District Court and Cause.]

ORDER DENYING DEFENDANT'S
MOTION TO AMEND JUDGMENT

On motion of the defendant under Rule 59 (e), Federal Rules of Civil Procedure, to amend the judgment of dismissal made, dated and entered herein on the 14th day of November, 1960, and filed in the office of the Clerk of this Court on November 16, 1960, by deleting therefrom the words "without prejudice" at the end of the body thereof, plaintiff appearing by Philip A. Levin, one of his attorneys, and defendant appearing by Lamar Tooze, one of its attorneys, and the Court after hearing argument in support of the same and being fully advised in the premises,

It Is Hereby Ordered that said motion to amend said judgment be and the same is hereby Denied.

Dated this 28th day of November, 1960.

/s/ WILLIAM G. EAST,
United States District Judge.

Presented by:

/s/ EDWIN J. PETERSON.

[Endorsed]: Filed November 28, 1960.

[Title of District Court and Cause.]

ORDER DENYING PLAINTIFF'S
MOTION FOR NEW TRIAL

On motion of the plaintiff under Rule 59 of the Federal Rules of Civil Procedure, to award him a new trial of the above-entitled action, plaintiff appearing by Philip A. Levin, one of his attorneys, and the defendant appearing by Lamar Tooze, one of its attorneys, and the Court having considered plaintiff's memorandum in support of the same and being fully advised in the premises,

It Is Hereby Ordered that said motion for a new trial be and the same is hereby Denied.

Dated this 28th day of November, 1960.

/s/ WILLIAM G. EAST,
United States District Judge.

Presented by:

/s/ EDWIN J. PETERSON.

[Endorsed]: Filed November 28, 1960.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Safeway Stores, Incorporated, a corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from such part only of the judgment of dismissal entered in this action on the 14th day of November, 1960, as dismissed this action without prejudice and also from the order denying defendant's motion to amend the said judgment of dismissal entered herein on November 28, 1960.

/s/ LAMAR TOOZE,

/s/ EDWIN J. PETERSON,

TOOZE, KERR, TOOZE &
MORRELL,

Attorneys for Appellant.

[Endorsed]: Filed December 28, 1960.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Safeway Stores, Incorporated, and Tooze, Kerr,
Tooze & Morrell, its attorneys:

You and Each of You are hereby given notice that Marvin Fannan, plaintiff above named, hereby

appeals to the United States Court of Appeals for the Ninth Circuit from the judgment of dismissal made and entered in the above cause on the 14th day of November, 1960.

POZZI, LEVIN & WILSON,
/s/ PHILIP A. LEVIN,
Attorneys for Plaintiff-
Appellant.

[Endorsed]: Filed December 28, 1960.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Before: Honorable William G. East,
U. S. District Judge.

November 14, 1960

Appearances:

MR. DONALD R. WILSON,
Of Attorneys Representing Plaintiff.

MR. LAMAR TOOZE,
Of Attorneys Representing Defendant.

* * *

MARVIN ANTHONY FANNAN

produced as a witness in his own behalf, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

By Mr. Wilson:

Q. Would you tell us your full name so we can all hear, please?

A. Marvin Anthony Fannan.

Q. And when and where were you born?

A. Milton-Freewater, Oregon; March 2nd, 1931.

Q. That makes you 29 at the present time?

A. Yes, sir. [19*]

* * *

Q. Now, do you remember what day of the week it was your accident happened, Mr. Fannan?

A. It was on a Monday.

Q. This was a Safeway store?

A. Yes, sir.

Q. What city was that located in?

A. Tillamook, Oregon, sir.

Q. Where were you living at that time?

A. I was livin' at Netarts.

Q. Did you have any relatives live in the area?

A. Yes, sir.

Q. Had you lived in that area before? [25]

A. Well, in the Tillamook area.

Q. Had you been in the Safeway store prior to this November 30th date?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Marvin Anthony Fannan.)

A. I prob—I think I had once or twice, maybe.

Q. Would you tell us how you got to the store this particular morning?

A. Yes. We drove from Netarts to the store.

Q. Who is we?

A. Well, it's my sister, my wife, my brother-in-law, and the two children.

Q. Who went in the store?

A. My sister and myself.

Q. What did the rest of them do?

A. Well, they was waitin' in the car.

Q. What was the specific reason for your going to Safeway?

A. Well, it was—I was lookin' at a truck across—right across from Safeway's, and we was gonna go on over and take a look at the truck.

I was just makin' up my mind between that truck and one up here in Hillsboro. We was gonna look the truck over briefly and then go on into the store when it opened.

Q. Did your sister go across the street with you?

A. No, she did not.

Q. What did she do?

A. She waitin' in the car. She was gonna holler at us when [26] the store opened.

Q. Did you see the store being opened?

A. I—I—I never seen it, my sister called me.

Q. Did you go into the store with her?

A. Yes, sir.

Q. Would you tell us where you went as you got in the store? A. As I went in the store?

(Testimony of Marvin Anthony Fannan.)

Q. Yes.

A. Well, I went back to pick up some, oh, supplies—sugar, coffee, and so forth. We went—oh, just went around and went through the aisle. My sister went on back to the—to the meat counter to pick up the scraps, oh, for crab nets. Well, that's where I went.

Q. You mean you both walked down the same aisle?
A. Yes, sir.

Q. Where were you headed at the time you were walking down the aisle toward the rear of the store or to the side—

A. I was headin' down the aisle toward the rear of the store.

Q. Would you tell us then what happened?

A. Well, I was—I just—well, like I was goin' up the aisle lookin' for supplies and I just slipped and fell.

Q. How did you fall?

A. I fell on my—on my knees and hands.

Q. Was your—how was your left leg, what position was it in?

A. Well, it was under me. I fell on my left leg. [27]

Q. Do you know what side of the aisle you were on as you fell?

A. Yes. I was on the—I was on the—I was on the right-hand side.

Q. Do you know approximately how wide the aisle is, to the best of your recollection?

A. I'd think somewheres—six, seven feet.

(Testimony of Marvin Anthony Fannan.)

Q. Now, did you notice what caused you to fall then as you were there?

A. Yes, sir. Just a little bit after I fell I looked back and there was a pencil spinning back down the aisle. Just——

Q. Where? Excuse me.

A. It was just spinning like a top down the aisle.

Q. Where was it located in reference to you?

A. It was behind me about, oh, ten or fifteen feet.

Q. When you say it was spinning you mean like it was laying on a flat surface twirling?

A. Yes, sir.

Q. What did you do then? Were you able to get up by yourself? What happened?

A. No, sir. I hurt so bad I didn't do nothin', I just set there.

Q. Who was the first one to you?

A. Well, the first one to me was my sister.

Q. Yes.

A. And then she—she got excited and run back to the back and [28] got a fella from the meat department. Then he came—he came and asked me a couple questions. In turn he got the manager of Safeway Store.

Q. Well, did you need any assistance in getting up? A. Yes, sir.

Q. Who helped you?

A. The manager helped me up.

Q. Where did you go after you were helped up?

(Testimony of Marvin Anthony Fannan.)

A. Well, he took me to the back of the store.

Q. By the back of the store, do you mean out of the place for the customers to walk?

A. Yes, sir; back in the back with the supplies and stuff.

Q. Some boxes? A. Yes, sir.

Q. What did you do, sit back—

A. Yes, sir, I sit down on a box back there.

Q. Now, did you see this pencil any time after you saw it spinning behind you?

A. Only other time I seen it was when the meat man picked it up and he gave it to the manager of the store.

Q. When did you see the manager have it?

A. Well, when I seen it was when he was puttin' it in his pocket. He slipped it in his pocket.

Q. Could you tell what kind of a pencil it was as he was putting it in his pocket? [29]

A. Well, the pencil that I seen was black—black, shiny pencil.

Q. Did you know whether it was—did you actually see a pencil or did you see a group of pencils?

A. Well, he put it in with some other pencils. It was just a round, pretty heavy pencil with a little screw apparatus on top, the one I seen.

Q. All right. Then after you were back in the store a little while in the back end, what did you do? Were you able to walk out?

A. No, sir. I asked—well, he was—he wanted me to go back and set down there a little bit. Then I wanted to go to the doctor. Then after a while he

(Testimony of Marvin Anthony Fannan.)

helped me out to the door. I called my brother-in-law and he helped me to the car, my [30] brother-in-law.

* * *

Q. When you went in the store—the Tillamook store, did you see any other people there other than Safeway employees?

A. No, sir. We was the first ones that went in.

Q. During the time that you were in the store and when you went out, did you see any other people other than Safeway employees?

A. No, sir. We went out through the back door out of the produce—out of this—where they had this stuff stored.

Q. Who did you see with regards to the Safeway personnel during the time that you were in the store, and the time that you left?

A. I seen the fellow from the meat counter—from the meat place back there and the store manager.

Q. Did you see anybody in the back room?

A. Oh, just workin' back there. There was a couple people back there just workin'. I think they was unloadin' a truck or [40] somethin', if I remember right. [41]

* * *

Cross-Examination

By Mr. Tooze:

* * *

(Testimony of Marvin Anthony Fannan.)

Q. When you were in your father's store, what kind of pencil did he use for marking?

A. Well, he used all types of pencils.

Q. Did he ever use a grease pencil so-called?

A. Yes, sir; he did.

Q. It was a regular grease pencil with a screw top, was it? A. Yes, sir.

Q. And they use it for marking [55] merchandise? A. Yes, sir.

Q. Your father used that? A. Yes, sir.

Q. Did you ever use one?

A. Yes, sir; I have. [56]

* * *

Q. Now, as I understand it the only Safeway people that you saw there at the time of the accident were the manager, Mr. Strawn, and the man who was in charge of the meat market; is that right? A. Mr. Strawn? Who is Mr. Strawn?

Q. That's this gentleman here (indicating).

A. Him and the fellow that was in the meat—that came back from the meat counter was the only ones that I came and talked—came in contact and talked to.

Q. Now, where was this pencil located that you say you saw? Which side of the aisle was it on as you were proceeding down the aisle?

A. Well, it must have been—it must have been on the right side, because that's where I fell.

Q. On the right side? A. Yes. [81]

(Testimony of Marvin Anthony Fannan.)

Q. How far away was it from the counter or the display shelves?

A. I can't—I don't—I don't know. I stepped on it. I don't know.

Q. I see. Now, did you step on it full weight?

A. I imagine, yes.

Q. How much do you weigh?

A. 225 pounds.

Q. How tall are you? A. Six foot one.

Q. Was that your weight at the time of this accident? A. Approximately so.

Q. What kind of shoes were you wearing?

A. Just a pair of shoes. Just ordinary shoes.

Q. Were they heavy shoes, work shoes?

A. I don't remember exactly.

Q. Did your stepping on the pencil crush the pencil? A. No.

Q. Was it damaged at all so far as you could tell?

A. I never—I never examined the pencil to see that it was crushed, or anything, but I don't think so.

Q. Did you feel anything crushing under your foot?

A. I felt it roll under my foot, not crush.

Q. Yes. Now, what part of your foot hit the pencil? A. The ball of my foot.

Q. Which foot was it? [82]

A. I slipped from—with my left foot. That was my——

(Testimony of Marvin Anthony Fannan.)

Q. That is, you struck it with your left foot on the ball of your foot?

A. I'm not sure, but I think I did.

Q. You had your whole weight on it, did you?

A. I was walking.

Q. Well, did you have your whole weight on your foot when you slipped and fell?

A. I imagine, yes.

Q. Well, we want to—if you don't know, say so, but if you do remember, say so, Mr. Fannan.

A. Well, I am normally walking. I don't know what weight I had on——

Q. But you did hit it with the ball of your foot?

A. With the ball of my foot.

Q. Did you weigh 225 pounds?

A. Yes, sir; approximately that.

Q. Did you have any injuries other than the injury to your knee?

A. You mean anywhere?

Q. Yes. A. Not that I know of.

Q. You didn't have any skinned elbow, or anything like that?

A. Oh, I have skinned my elbows.

Q. No. No. I mean at the time of this [83] accident. A. No.

Q. So, all of the injuries that you sustained were due to the injury to your knee?

A. Yes; I believe so.

Q. Now, when you fell did you actually strike your knee on the floor? A. Yes, sir.

Q. How did you fall? Just tell the jury.

(Testimony of Marvin Anthony Fannan.)

A. Well, I just—I just was—I was in the air, I reached for the—I reached for the counter where the stuff was—the stand where the stuff was there and I missed it and I just caught—I caught myself when my knees hit and then I went from my knees down to my hands.

Q. Now, when you stepped on this pencil and the—the pencil went forward or backwards?

A. It went backwards.

Q. Then how did you fall, forward or backwards? A. I fell forward.

Q. You fell like this (demonstrating)?

A. (Witness nods head.)

Q. On your hands and knees? A. Yeah.

Q. Did you break your fall with your hands?

A. Well, my hands was on the floor when I ended up. It all happened so quick I don't know how—exactly how I hit. [84]

Q. Now, where was your sister at the time you fell?

A. She was in front of me going toward the meat counter.

Q. How far in front of you?

A. I don't know exactly. 15, 20 feet, I imagine.

Q. She was bound for the meat counter which was down at the rear end of the store beyond this aisle that you were using; is that right?

A. Yes, sir.

Q. Do you wear glasses? A. No, sir.

Q. Is your eyesight good? A. Yes, sir.

(Testimony of Marvin Anthony Fannan.)

Q. And the lighting conditions were good there, were they not? A. Yes, sir. [85]

* * *

WANDA PERRIGO

produced as a witness in behalf of the plaintiff, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

By Mr. Wilson:

Q. Mrs. Perrigo, what relation are you to Marvin Fannan? A. He is my brother.

Q. Where do you presently live?

A. I live at Waldport, Oregon.

Q. Back in November 30th, 1959 where did you live? A. I lived at Netarts, Oregon.

Q. Now, were you in the Safeway store with your brother on November 30th?

A. Yes, sir.

Q. How did you people get to the store?

A. We took the car.

Q. And who went in the store?

A. My brother and myself.

Q. Would you tell us what route you took and what route your brother took as you entered the store?

A. Well, we just went in the door and went through the turnstile and then turned back where the aisleway and the counters—we started up one

(Testimony of Wanda Perrigo.)

of the aisles toward the meat market where I was going because I had been told to get some beef bones there for crab bait. [86]

Q. Now, as you were walking you were walking to the back of the store down an aisle?

A. Unh-hunh.

Q. Where was Marvin in relation to you as you were walking down that aisle?

A. Well, he had stopped—stopped to look for something—coffee, I believe—and I kept on going toward the meat market. And he started up again.

But just as I got to the end of the aisle I turned to tell him to get some cookies.

Mr. Tooze: Would you speak a little louder? I can't—

The Witness: Yes, sir. I told him to get some cookies. We were going to have kind of a—well, a lunch with our crab. Just as I looked around to tell him to get the cookies I seen him in midair. I run back to see what had happened and he was—by the time I got there, of course, he was down on the floor.

Q. (By Mr. Wilson): What condition did he appear to be in when you saw him on the floor?

A. Oh, his face was real white and he was—his leg was more or less crumpled underneath him, it was turned sideways.

Q. Which leg was that?

A. The left leg (indicating).

Q. Now, when you people entered the store was the door unlocked or were you standing there wait-

(Testimony of Wanda Perrigo.)

ing for it to be unlocked, or what were the circumstances? [87]

A. My brother and my husband went across the road. The door hadn't been unlocked yet. They went across the road to look at an old truck that they were going to get and make it work. My sister-in-law and I were sitting in the car waiting for them to get done with their car shopping and wait for the store to open. When it opened, why, I hollered and said that the store was open, "Come on." So——

Q. Do you know whether or not you were one of the first ones to enter the store—patrons?

A. Yes, sir; we were the first ones to enter the store.

Q. Did you see any other patrons in the store after you had entered it until the time you left?

A. No, sir; I didn't see any other patrons in the store at all.

Q. Were you carrying any kind of a pencil with you as you went into the store? A. No, sir.

Q. Now, where were you when you said that you saw Marvin fall or in the air?

A. I was almost to the end of the aisleway, almost to the meat counter.

Q. Had you walked by the same area where he was on the floor when you turned around?

A. Yes, sir.

Q. What did you do then when you went back to your brother?

A. Well, I tried to help him up, and I couldn't,

(Testimony of Wanda Perrigo.)

so I run back [88] to the meat counter and I asked the butcher there, I said, "Come and help me with my brother. He has fall—fell down." And he came around and he looked at my brother and then he went to get the manager of Safeway and——

Q. Did anyone help your brother up?

A. Yes; Mr. Strawn helped him up.

Q. Then what did they do, your brother and Mr. Strawn?

A. Mr. Strawn helped my brother to the back end of the Safeway to where they bring in their produce and things.

Q. Did you see any other store employees or notice them other than the man at the meat counter and Mr. Strawn, the manager?

A. There was one other one in the back room bringing in boxes. I'm almost positive of that, but not completely.

Q. What happened then after you people left the back room? How did you get out?

A. Mr. Strawn opened up the freight doorway and he helped my brother over to the doorway and I got my husband to come and help with him in the car. We put him in the car and took him to the doctor. [89]

* * *

Q. Now, did you happen to see the object which your brother rolled on?

A. I seen the object while it was still spinning. Mr. Strawn told the meat man, I'm sure that—to go pick it up, somebody had already been hurt on it.

(Testimony of Wanda Perrigo.)

Then I never seen it again until we got in the back. [90]

Mr. Tooze: What did you say? I can't quite hear.

The Witness: I beg your pardon.

Mr. Tooze: I can't quite hear.

The Witness: I say I seen the object while it was still spinning. When Mr. Strawn helped my brother up he told the meat man—he looked over and seen this pencil and he told the meat man, he said, "Go pick that up. One man's already been hurt."

Then he helped my brother into the back room and the meat man brought in the pencil and Mr.—give it to Mr. Strawn. He put it in his shirt pocket or apron pocket.

Q. (By Mr. Wilson): Did you have a chance to see what kind of a pencil it was at that time?

A. It was black and shiny and it was—didn't look like it had any other color on it. It was just, oh, five or six inches long, I guess, or something like that. Black-like, kind of slick looking like plastic.

Mr. Wilson: You may inquire.

Cross-Examination

By Mr. Tooze:

Q. Mrs. Perrigo, your eyesight is good?

A. Yes, sir.

Q. At the time of this accident were you required to wear glasses? A. No, sir.

(Testimony of Wanda Perrigo.)

Q. The lighting conditions at the place where your brother [91] fell were all right, weren't they?

A. Yes.

Q. When you were moving down the aisle going toward the meat counter you weren't looking for any merchandise to purchase on any of the counters which were on that aisle, were you?

A. No, sir.

Q. You were going to make your purchase at the meat market? A. Unh-hunh.

Q. Did you see this pencil?

A. No, sir; I didn't.

Q. Now, this pencil that you have mentioned, you say it was about five or six inches long?

A. Yes, sir.

Q. How close were you to it when—after the accident so you could see it?

A. Well, as close, really, as I was to it was when I saw the—when the man at the meat counter picked it up.

Q. Then were you there when that pencil was delivered by the man from the meat counter to Mr. Strawn? A. Yes, sir.

Q. Did you get a close look at it?

A. I never got an absolute perfect look at it, but it did—it had—he clipped it in his apron pocket, that's all.

Q. Now, as a matter of fact, wasn't it a little pencil—a little short pencil about three and a half inches long with a [92] wooden—a wooden pencil with a rather heavy, black lead in it? Wasn't that

(Testimony of Wanda Perrigo.)

the pencil that you saw? A. No, sir.

Q. Had you ever traded at the store before?

A. Yes. We have been in there three or four times. Not too long.

Q. I mean prior to this accident.

A. Unh-hunh. [93]

* * *

Mr. Wilson: Fine, your Honor. At this time, your Honor, I'd like to read the deposition of Walter R. Steinseik. The deposition was taken to perpetuate testimony Saturday morning.

* * *

Mr. Tooze: If your Honor please, I would like to state for the information of the Court and the jury that at the taking of this deposition the defendant Safeway Stores was represented by Mr. Edwin Peterson, one of our lawyers in our office. Therefore, it was he who will be asking questions. And I—

The Court: Rather than yourself?

Mr. Tooze: —that I will be reading.

(At this point the Court Clerk took the witness stand to read the answers as given by Mr. Steinseik in his deposition.)

Mr. Wilson: For the purposes of the record I asked these questions of Mr. Steinseik so I will be asking the questions [96] personally to Mr. Steinseik.

DEPOSITION OF WALTER R. STEINSIEK

“Q. Would you tell us your full name?

A. Walter Reeves Steinsiek.

Q. How old are you? A. 61.

Q. What is your present address?

A. Walnut Grove Motel—I don’t know the number—on Baseline Avenue; it is on Baseline Avenue in Hillsboro.

Q. Hillsboro, Oregon?

A. Hillsboro, Oregon.

Q. And what is your present occupation?

A. I am retired.

Q. And what caused you to retire?

A. A heart attack.

Q. Are you presently under disability with that heart condition? A. Yes, sir.

Q. And when did you last have a heart attack?

A. August the 13th, 1960.

Q. And are you presently disabled as declared by any doctors or organizations?

A. By the Veterans Administration.

Q. Have you in the past lived in Tillamook, Oregon? A. Yes, sir. [97]

Q. How long have you lived in Tillamook, Oregon? A. 11 years.

Q. From when to when?

A. 1949 to 1960.

Q. Were you in business in Tillamook, Oregon?

A. Yes, sir.

Q. And what was your business?

A. Sign painting.

Q. And under what name or style did you do

(Deposition of Walter R. Steinsiek.)

business? A. Under Walt's Signs.

Q. Did you drive or have a truck in your business?
A. Yes, sir.

Q. Did your truck have any signs or designations as to your business? A. Yes, sir.

Q. And what was the designation on your truck?

A. Walt's Signs, Phone Victor 2-4106.

Q. And where did that appear on the truck?

A. On both sides of the canopy. I have a canopy on it.

Q. Are you acquainted with the personnel working in the Safeway Store in Tillamook, Oregon?

A. Yes, I am.

Q. Are you acquainted with Raymond Strawn?

A. Yes, sir, I am. [98]

Q. And what is your acquaintanceship with him?

A. Just through a customer of the store.

Q. Did you shop at Safeway Store in Tillamook?
A. Yes, sir, I did.

Q. Was it your regular market that you shopped?

A. Not the regular one; not regular, no.

Q. How often would you say that you have gone into the store in a week or a month?

A. Oh, I would say in a week's time we would generally shop the week end, Thursday and perhaps Friday of the week. Other weeks we might have been in there one or two other days, but—

Q. Over how long a period of time would you say that you were a customer? A. 11 years.

(Deposition of Walter R. Steinsiek.)

Q. Were you acquainted with any other people employed by the store other than Raymond Strawn?

A. Yes, sir, I was.

Q. Were you acquainted with a fellow by the name of John Thomas? A. Yes, sir.

Q. And who was he?

A. He was a produce man, as I understand it; a produce manager.

Q. Were you ever approached by either one of these [99] gentlemen as employees of Safeway regarding the time that you may or may not have been in the store on November 30th or December 1 of 1959? A. Yes, sir, I was.

Q. And when was that in relation to those two dates?

A. Well, I was in the store on Monday morning—

Q. Of what?

A. —that would be the last day of November, since December 1st was Tuesday. I was there on Monday morning, November the 30th.

Q. Well, all right. Let me ask you the question, then, because I don't think that is particularly responsive to the question put.

Were you in the Safeway Store either on November 30th or December 1st of 1959?

A. Yes, sir, I was.

Q. And which day or days?

A. Monday.

Q. That would be November 30th of 1959?

A. That would be November 30th, 1959.

(Deposition of Walter R. Steinsiek.)

Q. Do you know approximately what time of day that you were in Safeway Store?

A. It is very, very difficult, but I can tell you it was between 10:00 and 11:00; to my knowledge I believe it was 10:00 to 11:00. [100]

Shall I give you the reasons for my belief?

Q. How do you know in regards to the day of the week that you were in the store and the time of day?

A. The reason that I know, it was Sunday afternoon that there was some article in the home that we ran out of, and I had some work there to do or something that I was doing and I asked my wife could it be—go until next morning, and she said yes, it would be all right, that could go to next morning. We get up at 8:00 o'clock in the morning and we have breakfast at 9:00 o'clock and then when I got finished with breakfast I went down to Safeway. That is why I say it must have been between 10:00 and 11:00 o'clock on Monday morning.

Q. How far do you live from the Safeway Store?

A. I live clear across town. It was approximately eight or nine blocks. The way I drove down 5th Street it would be eight or nine blocks.

Q. And did you drive your truck?

A. Yes, sir, I drove my truck.

Q. Now, were you approached by either one of the two gentlemen that we have just mentioned—

A. Yes, sir, I was.

(Deposition of Walter R. Steinsiek.)

Q. ——about your going into the store on either Monday or Tuesday of that week? [101]

A. It was the latter part of that week. I think Thursday was the day.

Q. And by whom were you approached?

A. John Thomas.

Q. And he is the produce man?

A. Yes, sir.

Q. And what was the reason for his contacting you?

A. He spoke to me and he said, 'Walt, do you have a little pencil about that long?' (Indicating.)

Q. And 'about that long' is about how many inches?

A. Well, that is the way he held his fingers was about that (indicating).

Mr. Peterson: There is a little ruler; I will just hold it up——

The Witness: About that long (indicating).

Mr. Peterson: About three and a half inches.

A. And I said—and larger; he said quite a large pencil; and I said, 'Yes, sir, I do.'

Q. All right. Did you do anything about seeing this pencil that he was apparently describing to you?

A. Yes, sir. He described to me what happened, and I said, 'John, I am sure that I didn't lose my pencil, because it is in a compartment in my work clothes,' and which I didn't have on at the time.

Q. That you went to the store or the day [102] you were talking to the produce man?

(Deposition of Walter R. Steinsiek.)

A. The time I am talking to the produce man.

Q. All right.

A. And I said, 'I can't get the pencil out of the pocket, so I can't see possibly how I could have lost it; but I am going home right now to see if that pencil is in my work clothes, and, if so, I am going to bring it down.' He said, 'Oh, no; you don't have to do that.' I said, 'Well, I am going to anyway, to satisfy my own mind.' So I went home to my work clothes and the pencil was there and I immediately took it down and showed it to him, and he made a remark that that wasn't exactly the kind of pencil, or something to that effect.

Q. Was that the only pencil that you carry about your person?

A. No, sir, it isn't the only one.

Q. What other type of pencils would you carry?

A. Would you like for me to show you, and the manner in which they are carried?

Q. Well, how many pencils do you carry?

A. Four.

Q. Were any of your pencils missing?

A. No, sir. [103]

Q. Do you know whether or not you dropped any pencils in any Safeway Store on Monday or Tuesday of that week?

A. I know positively well I did not.

Q. Were you ever shown the pencil that was described to you by the produce man?

A. No, sir; I never was.

(Deposition of Walter R. Steinsiek.)

Q. Did you ever talk to Mr. Strawn about the conversation between you and Mr. Thomas?

A. No, sir.

Q. Did you know Mr. Strawn by sight?

A. Yes, sir.

Q. And to converse with him?

A. Yes, sir.

Q. And did you back in November and December of '59?

A. Yes, sir, I did.

Q. Is this all that you know about any pencil incident that occurred in Safeway Store on the dates mentioned, as far as the incident happening?

A. I—it is all that I know that I am relating now.

Q. With your heart condition is it possible for you to appear in court on November 14th of 1960?

A. According to what the doctors of the Veterans have told me and my private doctor down there, no, I [104] can't.

Mr. Wilson: Off the record a minute.

(Discussion off the record.)

Mr. Peterson: Are you done now?

Mr. Wilson: I rest."

Mr. Tooze: "Cross-examination by Mr. Peterson:

"Q. Mr. Steinsiek, you were going to describe the pencils that you used, four pencils, you said. Would you describe those, please?

A. Yes, sir. Two of them are grease pencils, we call them grease pencils; one is white and one is

(Deposition of Walter R. Steinsiek.)

black. The other is a common ordinary lead pencil. Those three pencils have clips on them that hold them in my overalls. The other pencil is a short pencil about that long (indicating), that is round, black and larger than the ordinary pencil. It has no clip on it, but it has a compartment that fits down in the side of the bib of my overalls in which it is quite secure. Those are the——

Q. Are these grease pencils the same type that you have seen—— A. They are not.

Q. Let me finish my question.

A. I am sorry.

Q. I beg your pardon for interrupting, but I want to [105] finish this question first.

Are these the same type of grease pencils that you see in stores used for marking merchandise?

A. That is right.

Q. Now, this fourth pencil, was that sharpened on one or both ends? A. One end.

Q. And you say it was black?

A. It is black lead and a black casing.

Q. Do you know anything about a man that fell in the Safeway Store on November 30th, 1959?

A. Only what John Thomas told me.

Q. Do you recall what the article was that you purchased? A. No, sir; I do not.

Q. What do you wear when you work, Mr. Steinsiek? A. I wear striped bib overalls.

Q. Do you have more than one pair of overalls?

A. Yes, sir; I have two pair.

Q. But do you have only four pencils, or do you

(Deposition of Walter R. Steinsiek.)

have extra pencils in the truck or at your workshop?

A. In my studio at home I have extra pencils.

Q. Have you talked about this accident to anybody other than Safeway Store personnel?

A. No. [106]

Q. Have you——

A. I gave a statement to the——this office.

Q. To Mr. Wilson's office?

A. Yes, sir. I gave a statement to Mr. Wilson's office.

Q. And when was that, sir?

A. I can't remember. The date must be on it.

Q. Was it recently?

A. Oh, it was after I had the attack. The attack was August 13th and it was after that, but—may I add something to that question?

Q. Yes.

A. I met Mr. Strawn about a week or ten days ago, the first time I had seen him since I had given that statement, and I asked him why did he bring my name into this when I was not even remotely involved in it; and he said he was under oath and they asked him was anyone else in the store that morning and he had to give my name.

Mr. Wilson: I move that all be stricken as volunteered.

Mr. Peterson: I don't have any more questions."

Mr. Wilson: I move that all be stricken as voluntary. I withdraw that objection, your Honor.

Mr. Tooze: I have no further questions. [107]

(Deposition of Walter R. Steinsiek.)

Mr. Wilson: "Redirect examination by me.

"Q. Mr. Steinsiek, do you remember how many people were in the store at the time that you shopped in Safeway on this Monday morning that you related to us, or if there was anyone there at all?

A. There was others in there, perhaps three or four; there wasn't very many. I will say three or four.

Q. Do you remember whether you walked around the store or whether you went to a definite station, or do you remember?

A. Well, I tell you, I walked down the left-hand aisle of the store and turned to the—at the meat counter and came over by the bread counter and then to the register. Now, that is my general route in that store. I sometimes stop at that coffee, but that is on the way down that aisle.

Q. Now, when you say it is a general route, do you have any specific knowledge of what route you took this particular day?

A. No; I can't say. I can't do it.

Mr. Wilson: Any more questions, Mr. Peterson?

Recross-Examination

By Mr. Peterson:

Q. You don't recall who any of the people were in the store when you were in there? [108]

A. No, sir, I certainly—I just do not.

Q. If you saw them again would you be able to

(Deposition of Walter R. Steinsiek.)

recognize them? A. No.

Mr. Peterson: That is all I have.”

The Court: Is that the close of the deposition?

Mr. Wilson: No, your Honor. We opened it again.

Mr. Tooze: Now I'd like to have the record show that at 11:45 o'clock a.m. on the date of this deposition, which was taken on November 12th, 1960, beginning at 11:30 a.m. in the offices of the plaintiff's attorneys in the Cascade Building in the City of Portland, Oregon—at 11:45 a.m. the deposition was concluded but was reopened at 12:05 p.m. of the same day.

“Mr. Peterson: Are we reopening this as my witness or your witness? I don't know whether it will make any difference; it just depends on who goes first.

Mr. Wilson: I will reopen it.”

Mr. Wilson: These are questions again put by me to Mr. Steinsiek:

“Q. Mr. Steinsiek, you have brought with you today your overalls that you use in your work?

A. Yes, sir.

Q. And with your overalls you have also brought with you the pencils that you carry with you at work? A. Yes. [109]

Mr. Wilson: No, John, can we have the overalls and all the pencils——

Mr. Peterson: Well, Don, I think we should have the pencils marked individually, because that

(Deposition of Walter R. Steinsiek.)

will just simplify things. You can mark the whole things, but the pencils are so easily——

Mr. Wilson: Mark the overalls Deposition Exhibit No. 1; and the green plastic pencil as Exhibit 2; the green regular pencil with a clip on it as Exhibit 3; the black plastic pencil with a clip on it as Exhibit 4; and the black pencil with a point at one end as Exhibit 5.”

The Court: Now, we will have to renumber them for our purposes.

Mr. Wilson: That's correct, your Honor.

The Court: Is that 6-A through -E that you reserved?

Mr. Wilson: Yes, sir.

The Court: Very well. Let them be marked in their sequence.

Mr. Tooze: That would be exhibit——

The Court: 6-A, -B, -C, -D, and -E. You may step down and do that, Mr. Clerk.

(At this point the Clerk did as requested.)

(At this point the Clerk resumed the witness stand and resumed his pseudo capacity.) [110]

“Q. (By Mr. Wilson): Now, going back, Mr. Steinsiek, to the overalls that were marked for the purposes of identification Deposition Exhibit No. 1, are those the overalls?

A. Yes, sir, those are the overalls.”

The Court: Now, that is No. 6 or 6-A?

Mr. Wilson: 6-A, your Honor.

(Deposition of Walter R. Steinsiek.)

The Clerk: That is 6-A, sir.

“Q. (By Mr. Wilson): And did you have more than one overalls that you were wearing back in December of 1959?

A. Yes, yes; I have another pair.

Q. Are they of the same type?

A. Exactly the same type.

Q. And are these the same pencils that you used back in that time?

A. Those are exactly the same ones, yes, sir.

Q. Now, making specific reference to’—

Your Honor, should I then revert to the Pre-trial Order?

The Court: No. 2 will be 6-B, and so on.

“Q. (By Mr. Wilson): Now, making specific reference to Exhibit No. 6-E, where do you carry that pencil?

A. Right where it is now in that little compartment.

Q. And that is the little compartment of the bib of the overalls on the right?

A. Yes, sir, on the right. [111]

Q. Now, would you describe how you get that pencil out of the pocket when you are wearing the overalls?

A. I begin at the bottom with my finger and I begin to push up from the bottom until I can get it far enough out that I can reach it from the top.

Q. When you were in the store that particular morning do you remember picking up anything off the floor or reaching over for anything off the floor?

(Deposition of Walter R. Steinsiek.)

A. No, sir.

Q. Do you know whether or not specifically that you were wearing those particular overalls when you went in the Safeway store?

A. No, sir, I do not.

Q. Would you tell us what you use the short black pencil for? A. It is principally——

Q. That is Exhibit 6-E.

Q. ——for lay-outs on paper banners, show cards, or other rough surfaces, like a rough piece of plyboard, a wall, a concrete wall; it is very good for a lay-out on a concrete wall.

Q. How many pencils like that did you have back in December, '59?

A. That is it, the only one.

Q. Do you ever sharpen the pencil at both ends? [112] A. Never.

Q. Or a pencil of that nature? .

A. No, sir, never.

Q. You say that those pencils are used for banners like the type of banners that Safeway uses in their stores?

A. I have never made any for Safeway, but it is the same type, same type banner.

Q. Do you know whether or not there is personnel of Safeway who makes banners for Safeway?

A. They have an employee that makes their banners, yes.

Q. Right there at the Safeway Store?

A. Yes, sir.

(Deposition of Walter R. Steinsiek.)

Q. And is that type of pencil what you would use in making Safeway banner?

A. Not everyone uses that type of pencil, but I use it for that purpose.

Q. Is this a common type pencil in your particular trade and profession?

A. No, it is not common.

Q. Are you familiar with that type of pencil and what it is used for, and is it used for what you just described?

A. Well, it is originally an art pencil, [113] but——

Q. Are you an artist?

A. No, sir, I am not an artist.

Q. What type of work do you engage in in your sign work?

A. In all phases of sign work except neon.

Q. Is that lay-out as well as painting?

A. The lay-out as well as the painting, both water color and all oil color.

Q. The pencil that is Exhibit 6-E, do you know where that pencil was purchased or acquired by you?

A. Yes, sir.

Q. Where? A. At Kenwood.

Q. Where is that?

A. On 3rd Street in Tillamook.

Q. Where is that in relation to the Safeway Store?

A. It is on the same street about three blocks east of Safeway.

(Deposition of Walter R. Steinsiek.)

Q. Is it a general supply store for stationery and—— A. Yes, sir.

Q. ——that type of goods? A. Yes, sir.

Mr. Wilson: I have no further questions.

Recross-Examination

By Mr. Peterson: [114]

Q. Mr. Steinsiek, Mr. Wilson asked you if you were wearing these overalls that morning, and you said you couldn't be sure. A. Yes, sir.

Q. You were wearing a pair of overalls that morning; is that right?

A. I can't be sure there.

Q. If you were wearing a pair of overalls it would have been either this pair or another one?

A. It would have been that one or another one.

Q. And whichever pair of overalls you were wearing that morning, if you were wearing overalls, that would have also had these four pencils in them; is that correct?

A. Yes, sir, they would; they would have had those four pencils.

Q. Now, this pencil, Mr. Steinsiek, you said you used it for what purpose?

A. For lay-outs on rather rough surfaces, including paper banners and even showcards. They are not rough but that is very soft lead and you can make a very fine mark with it.

Q. Would this be used to sketch in the general outline? A. Yes. [115]

(Deposition of Walter R. Steinsiek.)

Q. Now, you have been in the sign painting business since November 30th, 1959, to what date?

A. No; I have been in the sign business in Tillamook since 1953.

Q. I understand that, but since November, 1959, how long did you continue in the sign painting business? A. Until August the 13th, 1960.

Q. Have you had much need for this pencil during the period from November 30th, 1959, to August 13th, 1960? Have you used that very much?

A. I tell you the truth, I don't think it has been out of the overalls except to change it. I don't think I have used—I know I haven't.

Q. Now, how long is this pencil when it is purchased new? How long was this particular pencil, Exhibit No. 6-E?

A. That pencil new was just twice that long (indicating), I would say.

Q. All right. I might say, Mr. Steinsiek, when did I first become aware of this pencil, Exhibit No. 6-E? A. Just a few moments ago.

Q. And that was after the deposition adjourned temporarily? A. Yes, sir, it was.

Q. Now, since that time I have procured this [116] envelope in which there is an exhibit. This envelope is marked Pretrial Exhibit No. 11, and on the outside are marked the words 'large pencil, three and a half inches long.' I will show you this pencil and ask you if you recall ever seeing that before.

A. No, sir, I do not; and it is sharpened on a pencil sharpener and I sharpen mine with a knife."

Mr. Tooze: Now, if your Honor please, the exhibit that was just referred to——

The Court: No. 11?

Mr. Tooze: ——is Exhibit 11 in the Pretrial Order.

The Court: Can you find it, Mr. Roberts?

Mr. Tooze: Yes, sir. It would be the same—I have the exhibit in my possession.

The Court: Oh. Is that reserved?

Mr. Tooze: No. It's marked as Exhibit 11 on the Pretrial Order so there is no change in the number.

The Court: Well, does the Clerk have it or do you have it in your possession?

Mr. Tooze: I have it in my possession. I will be glad to deliver it to the Clerk.

The Court: Let's have it identified.

Mr. Tooze: Yes.

(At this point Mr. Tooze handed the exhibit to the Clerk for marking.) [117]

* * *

Mr. Wilson: Well, plaintiff will offer all of our exhibits that have been marked, your Honor. Those are the X-rays as 1-A and -B, the deposition of Mr. Walt Steinsiek, which is No. 3, the hospital record which is Exhibit——

The Court: Just a moment. The deposition of Mr. Walt Steinsiek will be marked for identification No. 3. It's been read in evidence. The hospital records may be——

Mr. Wilson: St. Vincent's, No. 4.

The Court: Any objection to No. 4?

Mr. Tooze: No objection.

The Court: They will be received. [118]

(At this point Plaintiff's Exhibit No. 4, previously marked for identification was received in evidence.)

Mr. Wilson: Providence Hospital, No. 5.

The Court: Any objection?

Mr. Tooze: No objection.

The Court: It will be received.

(At this point Plaintiff's Exhibit No. 5, previously marked for identification, was received in evidence.)

Mr. Wilson: 6-A through -E, the overalls, and——

The Court: Any objection?

Mr. Tooze: No objection.

The Court: They will be received.

(At this point Plaintiff's Exhibits 6-A through -E, previously marked for identification, were received in evidence.) [119]

DEPOSITION OF WALTER R. STEINSIEK
(Continued)

Mr. Wilson: Now, we go back again to redirect examination.

“Q. Counsel asked you as to when you saw this pencil. As a matter of fact, this pencil was shown—all of us were shown, counsel and the court reporter, by you at the same time, was it not?”

A. Uh-huh, yes, sir.

Q. And it wasn't a matter of anyone else seeing it first. You just showed it to us together and that was when the deposition was reopened.

Mr. Peterson: I have one more question.

Recross-Examination

By Mr. Peterson:

Q. You said you gave a statement to somebody from Mr. Wilson's office. Did you show these pencils to him? A. I sure did.

Q. Did you show him this black pencil, Exhibit No. 6-E?

A. I sure did—and I told him—I showed him where it was, just exactly as I am showing you now.”

Mr. Wilson: No further questions.

Mr. Tooze: That ends it, your Honor. [120]

WILMA JEWEL FANNAN

produced as a witness on behalf of the plaintiff, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

By Mr. Wilson:

Q. You are the wife of Marvin Fannan?

A. Yes, I am. [121]

* * *

Q. Now, you were in the car, were you not, which was driven to the Safeway parking lot?

A. Yes, I was.

Q. Do you know what time of day it was approximately?

A. Well, it was about 9:30 in the morning.

Q. You did not go in the store yourself?

A. No; I stayed in the car with my niece and my daughter. [122]

Q. When did you first see your husband?

A. Well, after he went into the store the first time I saw him was when he called to his brother-in-law to come and help him back to the car. His sister was helping him in. [123]

* * *

Cross Examination

By Mr. Tooze:

* * *

Q. Now, what time did you say you got to the store?

(Testimony of Wilma Jewel Fannan.)

A. I believe it was 9:30. Or maybe it was 9:00. I'm not sure.

Q. 9:00 or 9:30? A. Yes, sir.

Q. Then you didn't go in the store? [130]

A. No, I didn't. [131]

* * *

Mr. Tooze: If your Honor please, at this time the plaintiff having rested his case, the defendant moves the Court for an order directing the jury to return a verdict in favor of the defendant for the reasons and on the grounds that there is no evidence proving or tending to prove that the defendant was negligent in any of the particulars claimed by the plaintiff, or at all; that there is no evidence proving or tending to prove that any act or conduct on the part of the defendant was a proximate cause of any injuries or damages sustained by the plaintiff; on the further ground that the evidence affirmatively shows that the conduct of the plaintiff himself in not paying attention where he was going was negligence as a matter of law which proximately contributed toward causing his accident and injuries. I would like to argue the motion, your Honor.

The Court: All right. [132]

Mr. Tooze: I would like this for the record.

I would like to point out for your Honor that there is no evidence in this case from which a jury may properly infer that the defendant Safe-

way Stores was responsible for the presence of this pencil on the floor which the witnesses have identified as a plastic pencil.

It is not connected in any way with the defendant Safeway Stores.

The further ground there is no evidence as to showing how long that condition had existed or that there was any actual knowledge of the condition on the part of the defendant.

A further ground is it would be wholly speculative the way the evidence now stands as to whether or not any act or conduct of the defendant Safeway was responsible for it. I am sure your Honor is familiar with the case of Cowden vs. Earley, the Oregon case decided by——

The Court: Down in Eugene?

Mr. Tooze: That's in Eugene. And in that case—I wonder if I could get that book. I'd like to——

The Court: Yes, you may. You can ask the bailiff to get it for you.

Mr. Tooze: Would you bring 214 Oregon, please? And also 35.

The Court: Down in the Osburn Hotel.

Mr. Tooze: That's right. Also 35 Am. Jur. [133]

This is the case of Cowden vs. Earley, 214 Ore. 384.

It involved a matter of slipping and falling in the Osburn Hotel.

The Court said—Judge McAllister said “The rule of law applying to a case of this kind is well established. An invitee who is injured by slipping on a foreign substance on the floor or stairs of

business property must in order to recover from the occupant having control of said property show either, A, that the substance was placed there by the occupant or, B, that the occupant knew that the substance was there and failed to use reasonable diligence to remove it or, C, that the foreign substance had been there for such a length of time that the occupant should by the exercise of reasonable diligence have discovered it and removed it."

Now, there is no evidence that this pencil was placed there by the defendant Safeway Stores. The only evidence here is that there was a plastic pencil which is sometimes used for marking merchandise.

B, that the occupant knew that the substance was there, there is no evidence here of any knowledge on the part of Safeway Stores or any of its employees.

And C, that the foreign substance had been there for such a length of time that the occupant should by the exercise of reasonable diligence have discovered and removed it, there is no evidence here whatever as to the length of time that this [134] pencil was on the floor prior to this fall.

Now, with respect to— it probably will be argued by counsel that the fact that it was a marking pencil, that is enough to connect Safeway. But, your Honor, that isn't enough. Let's assume that it was even a Safeway pencil. Suppose that was an admitted fact. That wouldn't be enough in this case, for this reason: The creation of the dangerous condition must have been a negligent act.

It might have been wholly accidental on the part of a Safeway employee. Also—and this is very important—in order to impose liability on Safeway because of the presence of this pencil, if we say that it was a Safeway pencil or the jury could infer it we would have to show that it got there while the employee was doing something in the furtherance of the business of his employer. It must be done within the scope of his employment. And on that there is absolutely no evidence whatever. [135]

* * *

Now, on the question of the matter of the—assuming now that this pencil belonged to a Safeway employee, before the defendant can be held liable for creating this condition it must be shown that that condition was created by the defendant's employee while he was doing something in the scope of his employment; in other words, in the furtherance of Safeway's business. There is absolutely no evidence of that here at all. [137]

* * *

Now, the inference in this case that the pencil was there for—by some act of the Safeway employee. But assuming that it was not by an act of the Safeway employee, then it was there a sufficient length of time somewhere about the store on the floor, presumably, or inferably, and that Safeway could be charged with the notice.

Now, the cases that counsel cites——

The Court: Now, let's discuss that point a little more because that has me disturbed. The testimony of the plaintiff's case is that these two people were the first people in the store.

Mr. Wilson: Yes; the only—there was three people in the store. There is two people in the store other than Safeway employees.

The Court: These are the first customers in the store.

Mr. Wilson: That's right, your Honor. The door was opened, [142] by Wanda Perrigo's testimony, she called her brother in and the two went in the store and went—walked directly for this aisle that they were walking down. Now, in opening statement counsel says that Safeway employees were walking up and down the aisleway, probably inferring that there was no pencil there. I don't know whether counsel is bound by his statement in opening statement. But I think the defendant is charged with the responsibility. However, I don't think that's of necessity——

The Court: Well, the sister walked down immediately in front of him.

Mr. Wilson: That's correct, your Honor. That's correct, your Honor. The sister walked first. She didn't see any pencil. Marvin Fannan was behind her.

The Court: Let's say she didn't step on any pencil.

Mr. Wilson: She said she didn't see or step on any pencil.

The Court: Well, the plaintiff didn't see the pencil. Certainly if he saw it and stepped on it he wouldn't have any claim.

Mr. Wilson: That's more than certain.

The Court: He didn't see it either. The first two people in there didn't see it.

Mr. Wilson: That's correct, your Honor.

The Court: Now, let's get rid of this notice. Let's find out who caused the creation.

Mr. Wilson: All right. In regard to who caused or created [143] this, your Honor, there are only two possibilities and only two specifications of negligence left in this Pretrial Order. The rest of them were stricken. One was that they deposited the pencil there or they permitted the pencil to remain. Now, if the Safeway personnel were the only ones there, it naturally follows, it has to be inferred from that very fact in existence that the store just opened and these people the only ones in the store, that Safeway personnel were the only ones there.

Now, if they didn't put it there someone else had to put it there. But there is no testimony. We are asked to speculate.

Counsel says that we are speculating. Your Honor could take the opposite point of view and say that there isn't a jury question here, it's speculating in behalf of the defense and against the plaintiff.

The Court: Well, then, I have got to disbelieve the plaintiff's case, then. They say that they were the first people there.

Mr. Wilson: That's right, your Honor.

The Court: Now, there couldn't have been anybody else.

Mr. Wilson: That's what I say, your Honor, there couldn't be anyone else.

The Court: They didn't see it and they walked right by it.

Mr. Wilson: That's correct, your Honor.

The Court: Well, then, why would Safeway people see it? [144]

Mr. Wilson: They have the responsibility of furnishing a safe premise on which to shop.

The Court: The plaintiff has the responsibility to exercise due care for his—measured by the same responsibility.

Mr. Wilson: But we are talking about whether or not liability has been established.

The Court: No. I think I am satisfied. Here we have in this case plaintiff, under his own testimony, after the store has been opened he was preceded by a witness on his own behalf, a relative. He claims that he fell upon something that neither she saw nor stepped upon. There is, correct, evidence in the case, giving plaintiff's evidence the most favorable light in the matter, some object which he claims he stepped on. He says that he looked back 10 or 15 feet and saw it spinning like a top.

Outside of that there is no employee of Safeway put in the area, there is no testimony that they ever saw an employee.

The testimony is to the effect that the sister went clear to the meat counter to advise him that somebody had fallen and in due time.

I'm content to say for the record in this case I have never seen a plainer case that was more speculative in the causation of the accident than this case. I grant the motion for dismissal.

Mr. Wilson: I take exception to the Court's ruling and [145] order a transcript of the testimony.

The Court: You certainly may have it.

Mr. Tooze: If your Honor please, I have already furnished the Court with a form of verdict. I think it will probably need to be amended.

The Court: This is an order of dismissal.

Mr. Tooze: I see.

The Court: Rule 41 provides that after the plaintiff has completed presentation of his evidence the defendant, without waiving his right to offer evidence in the event of the motion not granted, may move for dismissal on the grounds that upon the facts and the law the plaintiff has shown no right to relief. That's the way I feel about it. [146]

* * *

(At this point the jury returned to the courtroom and the following proceedings occurred:)

The Court: Members of the jury, you have been called today and selected to sit on a case and try the case before the Court. You have heard the testimony that has been produced and you have heard the rulings of the Court during the course of the trial.

During your absence the defendant has made a motion pursuant to the Rules of Federal Civil Procedure for an order of dismissal on the grounds and for the reason that the plaintiff's case, taking it as it now stands, shows no grounds in either law or fact that relief could be granted.

The Court has heard the legal arguments of counsel and discussed the factual situation with counsel, and the Court has come to the conclusion that under the law Safeway Stores is not a guarantor of the safety of any individual doing business with it in the store and that it owes to its customers the duty that you and I owe to each other in our ordinary daily lives not to be negligent towards that person to the extent that it would cause him injury.

The Court has concluded that under the evidence presented to the close of the plaintiff's case there has been no evidence that would present any question of fact to you as members of the jury as to negligence on the part of the Safeway Store people. Therefore, accordingly, as a matter of law the Court has granted an order of dismissal.

* * *

[Endorsed]: Filed April 13, 1961. [147]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Petition for Removal with complaint attached and marked "Exhibit A"; Answer and demand for jury trial; Pretrial order; Judgment of dismissal; Motion to amend judgment; Motion for new trial; Order denying defendant's motion to amend judgment; Order denying plaintiff's motion for new trial; Notice of appeal by Safeway Stores, Incorporated; Bond for costs on appeal; Notice of appeal by Marvin Fannan; Bond for costs on appeal; Concise statement of points on appeal; Stipulation and order for extension of time to docket appeal; Order directing Clerk to forward exhibits to Court of Appeals; Joint designation of contents of record on appeal; and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 60-170, in which Safeway Stores, Incorporated, is appellant and Marvin Fannan is appellee on the first Notice of Appeal and Marvin Fannan is appellant and Safeway Stores, Incorporated, is appellee on the second Notice of Appeal; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed

United States Court of Appeals
for the Ninth Circuit

No. 17315

MARVIN FANNAN (Misnamed in Plaintiff's
Complaint as MARVIN FANNON),

Appellant,

vs.

SAFEWAY STORES, INCORPORATED,

Appellee,

and

SAFEWAY STORES, INCORPORATED,

Appellant,

vs.

MARVIN FANNAN (Misnamed in Plaintiff's
Complaint as MARVIN FANNON),

Appellee.

PLAINTIFF-APPELLANT'S CONCISE
STATEMENT OF POINTS ON APPEAL

Comes now plaintiff-appellant Marvin Fannan,
and as his statement of points on appeal in the
above-entitled cause states:

The Court erred in granting defendant's motion
made at the close of plaintiff's cause for a dismissal
thereof, and in entering a judgment of dismissal
of plaintiff's cause of action.

Respectfully submitted,

POZZI, LEVIN & WILSON,

/s/ PHILIP A. LEVIN,

Of Attorneys for Plaintiff-
Appellant Marvin Fannan.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 28, 1961.

[Title of Court of Appeals and Cause.]

CONCISE STATEMENT OF POINTS ON AP-
PEAL OF DEFENDANT SAFEWAY
STORES, INCORPORATED

The points upon which the defendant will rely on its appeal are:

1. The court erred in not treating defendant's motion for a directed verdict made at the conclusion of the plaintiff's case as a motion for a directed verdict under Rule 50, Federal Rules of Civil Procedure, the granting of which operates as an adjudication upon the merits.

2. The court erred in dismissing the action without prejudice under Rule 41, Federal Rules of Civil Procedure in response to a motion by defendant at the conclusion of plaintiff's case for a directed verdict under Rule 50, Federal Rules of Civil Procedure, after ruling that the plaintiff's evidence was insufficient to support a judgment in his favor.

3. The court, after discharging the jury, following defendant's motion for a directed verdict under Rule 50, Federal Rules of Civil Procedure, and following a ruling by the court that the plaintiff's evidence was insufficient to support a judgment in his favor, erred in dismissing the action without prejudice under Rule 41, Federal Rules of Civil Procedure as the only means then available to remedy the error in failing to direct a verdict was a judgment of dismissal having the effect of an adjudication on the merits.

4. The court erred in denying defendant's motion to amend the judgment by deleting the words "without prejudice" at the end of the body thereof.

/s/ LAMAR TOOZE,

Of Attorneys for Defendant-Appellant Safeway Stores, Incorporated.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 2, 1961.

[Title of Court of Appeals and Cause.]

STIPULATION FOR AND DESIGNATION OF
CONTENTS OF PRINTED RECORD ON
APPEAL

* * *

It is further stipulated between the parties that the cost of printing the record on appeal be divided equally between the parties, without, however,

prejudicing either party to claim his or its share of the cost of printing the record in the event that costs are allowed in the party's favor upon final determination of the appeal.

Dated this 26th day of April, 1961.

/s/ PHILIP A. LEVIN,

Of Attorneys for Appellant and Appellee Marvin Fannan.

/s/ EDWIN J. PETERSON,

Of Attorneys for Appellant and Appellee Safeway Stores, Inc.

[Endorsed]: Filed May 2, 1961.